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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 753

93 COURT CORPORATION, ANTHONY M. MEYERSTEIN, INC., ANTHONY M. MEYERSTEIN and THEODORE B. MEYERSTEIN,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALBERT FOREMAN
Attorney for Petitioners
708 Third Avenue
New York, N.Y. 10017

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Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit (Waterman, Marshall and Anderson, Circuit Judges) entered herein on August 31, 1965, which affirmed an order of the District Court of the United States for the Eastern District of New York, granting the respondent's motion for the appointment of a receiver in an action brought to foreclose a mortgage and denying the petitioners' cross-motion to dismiss the complaint on the ground the action was barred by the applicable Statute of Limitations.

Citations to Opinions Below

The opinion of the United States District Court for the Eastern District of New York (Rosling, *J.*) is not officially reported and is printed in the Record transmitted herein at pages 32a to 36a. The opinion of the Court of Appeals is not yet officially reported and is printed in the Appendix herein at pages 1 to 7.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). The judgment of the Court of Appeals was entered on August 31, 1965, and is printed in the Appendix herein at pages 8 & 9 .

Question Presented

Did the Congress, in creating the Reconstruction Finance Corporation (15 U.S.C. Section 601) intend that the Reconstruction Finance Corporation be endowed with such sovereign immunity so that State Statutes of Limitation are not applicable to it?

Statutes Involved

The statutory provisions involved are:

The New York State Statute of Limitations relating to the commencement of actions for the enforcement of mortgages against real property (Sec. 47a CPA, now Sec. 213 CPLR).

The organizational act creating the Reconstruction Finance Corporation (15 U.S.C. Section 601, et seq.)

Statement of the Case

The United States began an action on November 5, 1963 to foreclose a mortgage executed by one of the petitioners, 93 Court Corporation, to the Reconstruction Finance Corporation hereinafter referred to as R.F.C. on June 2, 1948 and assigned by the R.F.C. to the Small Business Administration (S.B.A.) on or about June 30, 1957.

The mortgage upon which the action is based was given by 93 Court Corporation to secure a note executed by Anthony M. Meyerstein, Inc. (another of the petitioners herein). The note is dated September 26, 1946, and was issued to the R.F.C. The mortgage, running to the R.F.C. as mortgagee is dated June 2, 1948 and recites that the mortgage was given to secure the payment of the unpaid balance of the indebtedness of Anthony M. Meyerstein, Inc.

Nothing was paid on account of the mortgage since the date of its execution in 1948 and no action was taken by the R.F.C. or the subsequent holder of the mortgage (i.e., the S.B.A.) until the United States began suit in 1963, approximately fifteen years after the execution of the mortgage.

In connection with its action to foreclose the mortgage, the United States moved, by order to show cause dated March 26, 1965, for an order appointing a receiver of the rents and profits of the premises.

The petitioners cross moved to dismiss the complant, asserting the action was barred by the Statute of Limitations.

Judge Rosling granted the respondent's motion to appoint a receiver and denied the petitioners' cross-motion to dismiss, citing the traditional rule *"nullum tempus regi."* (The Statute of Limitations does not run against the sovereign).

The Second Circuit Court of Appeals affirmed Judge Rosling on both of the rulings noted above, relying, however, on different grounds.

On appeal, the petitioners urged that the rule relied upon by Judge Rosling was not applicable to the present case, citing *RFC* v. *Menihan Co.*, 312 U.S. 81, 84 (1941) for the proposition that "sovereign immunity" in the case of a government agency is not presumed and that nowhere in the Act creating the R.F.C. is there any indication that Congress intended the R.F.C. to have the "privileges and immunities" of the sovereign.

The Court of Appeals, in affirming Judge Rosling, agreed that *RFC* v. *Menihan Co.*, 312 U.S. 81 (1941) and *Keifer & Keifer* v. *RFC*, 306 U.S. 381 (1939) stand for the proposition that governmental immunity is not presumed. The Court of Appeals, however, rested its decision below on the argument that in *Keifer* it was the doctrine of soverign immunity from suit that was sought to be invoked and that, in effect, sovereign immunity from suit (as opposed to immuntiy from Statutes of Limitations) presented a special case and that therefore *Menihan* and *Keifer* could not be read outside the scope of their specific holdings.

The Court of Appeals, in addition, in support of its opinion, argued affirmatively that this Court has never ruled on the question of soverign immunity when the United States is a plaintiff.

Reasons for Granting the Writ

The decision of the Court of Appeals is in direct conflict with the aforesaid *Menihan* and *Keifer* opinions of this Court and, in addition, involves a question of the applicability of a State statute to a government corporation, a question which should be settled by this Court. It is also to be noted that, while the Court of Appeals citation of *United States* v. *Borin,* 209 F.2d 145 (5th Cir.), cert. denied, 348 U.S. 821, in support of its position is undeniably correct, the appellee below conceded that the opposite position had been approved as *dictum,* in *Dorsey* v. *RFC,* 101 F. Supp. 197, 199 (N.D. Ill.), affirmed 197 F. 2d 468 (7th Cir.). This Court should resolve this conflict.

The crux of the appellants' position and their primary argument in support of the present writ is that the *Menihan* and *Keifer* decisions have been unduly restricted by the Court below and by the Fifth Circuit in *Borin,* supra.

The major point of the *Menihan* and *Kiefer* cases is that the creation of a government agency automatically results in a loss of all sovereign immunity to the agency and the agency only gets as much governmental immunity as Congress *specifically intends.*

> "The Reconstruction Finance Corporation is a corporate agency of the Government which is its

sole stockholder, 45 Stat. 5, 15 U.S.C. 61. It is managed by a board of directors appointed by the President by and with the advice and consent of the Senate. The corporation has wide powers and conducts financial operations on a vast scale. While it acts as a governmental agency in performing its functions (see Pitman vs. Home Owners Loan Corp., 308 U.S. 21, 32, 33), still its transactions are akin to those of private enterprises and the mere fact that it is an agency of the government does not extend to it the immunity of the Sovereign. Sloan Shipyards Corp. vs. U.S. Fleet Corp., 258 U.S. 549, 566, 567. Congress has expressly provided that the R. F. C. shall have power 'to sue and be sued, to complain and defend, in any Court of competent jurisdiction, State or Federal' * * *

"We have had recent occasion to consider the status in relation to suits, of a regional corporation chartered by the Reconstruction Finance Corporation and we have set forth the general principles which we think should govern in our approach to the particular question now presented. Keifer vs. Reconstruction Finance Corporation, 306 U.S. 381. In the Keifer case we did not find it necessary to trace to its origin the doctrine of the exceptional freedom of the United States from legal responsibility, but we observed that 'because the doctrine gives the government a privileged position, it has been appropriately confined.' Hence, we declared that 'the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work.' Id., p. 388. Recognizing that Congress may endow a gov-

ernmental corporation with the government's immunity, we found the question to be 'Has it done so?' That is, immunity in the case of a governmental agency is not presumed. We sought evidence that Congress had intended that its creature, considering the purpose and scope of its powers, should have the immunity which the sovereign itself enjoyed, and we noted the practice of Congress as an indication 'of the present climate of opinion' which had brought governmental immunity from suit into disfavor. Accordingly, being unable to find that Congress had intended immunity from suit we denied it. * * *

"The additional allowance made by courts of equity in accordance with sound equity practice is likewise such an incident. Sprague v. Ticonic Bank, 307 U.S. 161. We perceive no reason for holding that petitioner may avail itself of the judicial process in accordance with the authority conferred upon it and escape the usual incidents of that process in case its assertions of right prove to be unfounded. On the contrary, we think that the unqualified authority to sue and be sued placed petitioner upon an equal footing with private parties as to the usual incidents of suits in relation to the payment of costs and allowances." *RFC* v. *Menihan Corp.*, 312 U.S. 81, 83.

In *Keifer & Keifer* vs. *Reconstruction Finance Corporation*, 306 U.S. 381, Mr. Justice Frankfurter stated at 389:

"Congress may, of course, endow a governmental corporation with the Government's immunity. But always the question is, has it done so?

> Federal Land Bank vs. Priddy, 295 U.S. 220, 231, cf., Helvering vs. Gerhardt, 304 U.S. 405, 411-412n."

So, too, in *Monolith Portland Midwest Co.* vs. *Reconstruction Finance Corp.,* 178 Fed. 2d 854, U.S.C.A. 9th, the Court stated at 858:

> "It is true as appellant points out that the mere fact that the Reconstruction Finance Corporation is a government agency does not extend to it all the powers and immunities of the Sovereign. Reconstruction Finance Corporation vs. J. G. Menihan Corp., 1941, 312 U.S. 81, 83, 61 S. Ct. 485, 85 L.Ed. 595. But it is also true that the Congress could endow Reconstruction Finance Corporation with such governmental powers and immunities as it saw fit. Keifer & Keifer vs. Reconstruction Finance Corporation, 1939, 306 U.S. 381, 389, 59 S.Ct. 516, 83 L.Ed. 784."

A restriction of the aforementioned cases to the issues of liability for costs and ability to sue is simply not consonant with the reasoning of those cases.

Likewise, a complete examination of the Act creating the R.F.C., in no way extends to the R.F.C. any of the powers and immunities of the Sovereign. (15 U.S.C. Section 601, et seq.)

The citation by the Court below of *Cherry Cotton Mills, Inc.* v. *United States,* 327 U.S. 536 is inapposite. Even if the right asserted here may be asserted by the United States as its own, it does not follow that the United States can assert that right free from any defenses which might be available against the R.F.C.

In short, labeling this right as one belonging to the United States offers no clear or easy answer to the question presently before this Court, since it is the position of the R.F.C. and the defenses to its claim (were the R.F.C. the present plaintiff-appellee) which should determine the issue. (*Guaranty Trust Co.* v. *United States,* 304 U.S. 126).

Conclusion

For all of the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be granted.

ALBERT FOREMAN
Attorney for Petitioners

Opinion of Court of Appeals for Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 509—September Term, 1964.

(Argued May 19, 1965 Decided August 31, 1965.)

Docket No. 29699

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

93 COURT CORPORATION, ANTHONY M. MEYERSTEIN, INC., ANTHONY M. MEYERSTEIN and THEODORE B. MEYERSTEIN,

Defendants-Appellants,

—and—

THE PEOPLE OF THE STATE OF NEW YORK, etc.,

Defendants.

Before:

WATERMAN, MARSHALL* and ANDERSON,

Circuit Judges.

The United States brought action to foreclose a mortgage given as security for a note payable to Re-

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* Judge Marshall heard oral argument and participated in the decision in this case, voting to affirm. He resigned to become Solicitor General of the United States before he could formally concur.

construction Finance Corporation, and prayed for the appointment of a Receiver. Defendants pleaded the New York State Statute of Limitations as a bar. The court below, United States District Court for the Eastern District of New York, Rosling, *J.*, appointed a Receiver and denied defendants' motion to dismiss.

Order below affirmed.

MORTON HOLLANDER, Atty., Department of Justice, Washington, D.C. (John W. Douglas, Asst. Atty General; Joseph P. Hoey, U.S. Attorney; David L. Rose, Florence Wagman Roisman, Attorneys, Dept. of Justice), *for Plaintiff-Appellee.*

ALBERT FOREMAN (Carl Levine, Morgulas & Foreman), New York City, *for Defendants-Appellants.*

WATERMAN, *Circuit Judge*:

The government commenced an action to foreclose a mortgage that secured a note given to the Reconstruction Finance Corporation (hereinafter RFC) and moved for the appointment of a receiver. Defendants cross-moved to dismiss on the ground that the government's action was barred by the running of the Statute of Limitations. In a single order the court below appointed a receiver and denied defendants' cross-motion to dismiss. Defendants appeal.[1]

The sole issue before us is whether either a state statute of limitations or the doctrine of laches may

[1] We have jurisdiction to review this interlocutory order appointing the receiver, 28 U. S. C. §1292(a)(2) and the propriety of this order depended in turn on the appropriateness of the denial of defendants' cross-motion.

be utilized by these defendants to bar action by the United States to enforce rights of the Reconstruction Finance Corporation. We affirm the determination by the district court that this action may not be so barred.

The facts are not disputed and may be briefly stated. On September 26, 1946 Anthony M. Meyerstein, Inc. executed a note for $1,725,000 evidencing a loan made to it by the RFC, and Anthony M. Meyerstein and Theodore B. Meyerstein, officers of the corporation, executed a guarantee of that note. On June 2, 1948 defendant 93 Court Corporation, by its president, Anthony M. Meyerstein, executed a mortgage as collateral security for the note. The note provided that interest was to be paid on the 26th of each month and that the principal and any unpaid interest were payable on September 26, 1948. The mortgage provided that the mortgagor waived all demand, notice of nonpayment or other default; and too, that the holder of the mortgage in any action to foreclose it was entitled to have a receiver appointed. Meyerstein, Inc. defaulted on the note, leaving $132,563.38 in principal, and unpaid interest from February 24, 1950, due and owing.

On June 30, 1957, pursuant to a reorganization plan that abolished the RFC and distributed its assets and functions among various other agencies, the mortgage of 93 Court Corporation was transferred to the Administrator of the Small Business Administration. In November 1963, in order to recover the remaining unpaid principal and interest, the United States commenced this action against the owner-mortgagor 93 Court Corporation and the Meyersteins to foreclose the mortgage. The defendants pleaded the New York

statute of limitations applicable to actions commenced upon mortgages of real property,[2] and the lower court ruled that this defense was not available against the government.

The rule *nullum tempus occurrit regi*—the statute of limitations does not run against the sovereign—is explained historically as a vestige of the privileges of the English king, *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 132 (1938). Its survival in this country has been attributed to the policy that the public interests should not be prejudiced by the negligence of public officers. *United States* v. *Nashville, C & S. L. Ry.,* 118 U. S. 120 (1886); *United States* v. *Thompson,* 98 U. S. 486 (1878). As recently as 1940 the Supreme Court termed the exemption of the United States from the bar of statutes of limitations or from the defense of laches a "well settled" rule of law. *United States* v. *Summerlin,* 310 U. S. 414 (1940). We are bound by this rule,[3] and the appellants recognize that we are.

Appellants say, however, that the rule does not apply to bar actions brought to enforce obligations owed to the RFC. They contend the rule that state statutes of limitations do not bar actions to enforce rights of the United States is but one manifestation of the doctrine of sovereign immunity, and therefore limiting rules confining the application of this doctrine

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[2] The lower court held that defendants were relying upon section 47(a) of the old New York Practice Act. Neither party quarrels with this holding on appeal.

[3] It is worth noting that the issue raised here is distinct from that posed by an Act of Congress that creates a private right of action but does not contain a statute of limitations. In those situations Congress's silence has been construed so as to make state statutes of limitations available to the defendant. E.g., *Campbell* v. *City of Haverhill,* 155 U. S. 610 (1895); *Chattanooga Foundry & Pipe Works* v. *Atlanta,* 203 U. S. 390 (1906).

should be here applied. One such limiting rule, and the rule on which appellants principally rely, states that "immunity in the case of a governmental agency is not presumed." *RFC* v. *Menihan Co.*, 312 U. S. 81, 84 (1941). Appellants rightly point out that nowhere in the Act creating the RFC is there any indication that Congress intended rights acquired by the RFC to override state statutes of limitations, and therefore argue that in the absence of any such Congressional intent we should not presume that Congress intended to confer this immunity on the RFC. We are urged to hold that when the United States seeks to enforce a right acquired from the RFC it must submit to the same laws that govern other suitors. We cannot agree. In *Keifer & Keifer* v. *RFC*, 306 U. S. 381 (1939), Mr. Justice Frankfurter stated that because the doctrine of sovereign immunity "gives the government a privileged position, it has been appropriately confined." *Id.* at 388. But it was not a mere "privilege" that invoked confinement in that case. More important was the fact that the questioned privilege was immunity from suit, a privilege that if allowed unrestricted application would render individuals almost powerless to remedy an abuse of official power. Foreseeing the consequences of an unchecked use of the doctrine of sovereign immunity courts early announced that courts would not infer it, and indicated that Congress, if it wished government corporations to enjoy it, must, in terms, endow them with it.

There is not the same need to confine the application of the rule that the United States is exempt from statutes of limitations and the defense of laches unless Congress provides otherwise, as there is a need to confine the immunity of the sovereign from suit. This rule does not serve to immunize the government from

the claims of individuals but is simply the most important of a number of advantages, both statutory,[4] and court-made,[5] that the United States enjoys when it goes into court. Wright, *Federal Courts,* 60-61 (1963). The policy underlying this exemption is that the failure of a government employee to bring an action within the time prescribed by a state statute of limitations should not bar the government from bringing the action if the action is one to enforce public rights or to protect the public fisc. The rule allows the government to maintain belated actions to enforce public rights regardless of the "governmental" or "business" nature of the government-sponsored activity that created the rights. See *United States* v. *Summerlin,* 310 U. S. 414 (1940) (enforcement of rights acquired through Federal Housing Administrator under National Housing Act allowed despite running of statute of limitations); *Chesapeake & Del. Canal Co.* v. *United States,* 250 U. S. 123 (1919) (suit to recover dividends allowed despite running of statute of limitations). We believe the policy underlying this exemption to be generally salutary and we decline to hold that Congress must specifically endow each government corporation it creates with an expressed exemption from the bar of statutes of limitations or from the defense of laches. The Supreme Court has never ruled that there is no presumption of immunity when the United States is a plaintiff.[6]

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[4] E.g., Fed. R. Civ. P. 12(a) (United States given extra time to file an answer); Fed. R. Civ. P. 73(a) (United States given extra time to take an appeal).

[5] *Causey* v. *United States,* 240 U. S. 399 (1916) (in rescission action United States not required to make tender).

[6] Of course, Congress remains free to enact statutes of limitations applicable to certain claims of the United States. See, e.g., Act of March 3, 1891, 26 Stat. 1093 (six year limit on actions to annul land patents).

In summary, the present action is brought by the United States to enforce a right acquired by the RFC. This right is a right of the United States that can be enforced by and in the name of the United States. *Cherry Cotton Mills, Inc.* v. *United States,* 327 U. S. 536 (1946). It follows that neither the New York statute of limitations nor the doctrine of laches bars the enforcement of this right. This conclusion is supported by the decision of at least one other court of appeals. *United States* v. *Borin,* 209 F. 2d 145 (5 Cir.), cert. denied, 348 U. S. 821 (1954).

The order below is affirmed.

Judgment of Circuit Court of Appeals for Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of August one thousand nine hundred and sixty-five.

Present: HON. STERRY R. WATERMAN,
HON. ROBERT P. ANDERSON,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

93 COURT CORPORATION, ANTHONY M. MEYERSTEIN, INC., ANTHONY M. MEYERSTEIN and THEODORE B. MEYERSTEIN,

Defendants-Appellants,

"JOHN DOE" and "MARY DOE", et al.,

Defendants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

United States Court of Appeals
Second Circuit
Filed August 31, 1965
A. DANIEL FUSARO, Clerk

#509